IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 404

MELROSE DISTILLERS, INC., CVA CORPORATION AND DANT DISTILLERY AND DISTRIBUTING CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONERS

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The use of *italics* herein is for emphasis unless otherwise indicated. References to Petitioners' main brief will be (Pet. Br.); to Respondent's brief (Resp. Br.) and to the record (R.).

ARGUMENT IN REPLY TO RESPONDENT'S BRIEF

I. Important Areas of Petitioners' Brief Are not Disputed.

In its brief Respondent nowhere challenges Petitioners' exposition of the fundamental difference in nature and purpose between a civil or remedial action and a criminal prosecution (Pet. Br. 10-13). This is worthy of note for

unless and until that difference is somehow reconciled or explained away (if it can be) it is very difficult to see how criminal fines imposed in 1958 on corporations dissolved in 1955 could be, at the time of such dissolutions, "existing debts and obligations" within the language of *Sec. 72(b) and 74(b), Article 23, Annotated Code of Maryland 1951* (Pet. Br. 21), or "debts due from the corporation" within the language of *Sec. 281, Title 8, Delaware Code 1953* (Pet. Br. 25).

Nor does Respondent, anywhere in its brief, disagree that the main objective of criminal punishment is not retribution or expiation, but prevention and reformation (Pet. Br. 18-19). This, too, may be worthy of note, because so long as the law remains that a corporation is a separate legal entity, capable of committing a crime and owning its own property, it can hardly be denied that its dissolution either fully attains, or renders moot, those objectives, so far as the particular corporation is concerned. Insofar as the objective is prevention of crime by *others*, Congress *more* than met that need in the Anti-trust field in 1914 when it enacted *Sec. 24, Title 15, U.S.C.A.*, whereby a corporation's violation is ipso facto a violation by the participating directors, officers, or agents, each of whom may be fined or imprisoned (although the corporation can only be fined) (Pet. Br. 4). That section is conspicuously omitted in Respondent's brief. The spectres of personal fines (and imprisonment) facing corporate directors, officers and agents through application of that section are of a certainty, in all common sense and judgment, "deterrents of others" to a degree which a single fine imposed upon an erring corporation could never equal.

II. Respondent's Brief Seems to Overlook that a Corporation Is a Separate Entity from Its Stockholders.

Respondent asserts that the assets of a corporation go to its stockholders upon its dissolution (Resp. Br. 10). What is meant, of course, is "net assets". Therefore, Respondent reasons, "A fine levied on the dissolved corporation would thus affect and punish the same persons as before dissolution — the stockholders" (Resp. Br. 6 and 10). This logic is based upon the faulty premise that a fine levied upon a corporation affects and punishes its stockholders, and that the stockholders are continuously the same persons. It ignores (1) that the corporation is a separate entity from its stockholders; (2) that the corporation (not its stockholders) owns its property, and (3) that stockholders (who may be different persons from day to day) are not punishable for crimes of the corporation. In *Pierce v. National Bank of Commerce* (1926, C.C.A. 8), 13 F. (2d) 40, cert. den. 273 U.S. 730, the court said (47):

> "The general doctrine is well established that a corporation is a legal entity distinct from its individual members or stockholders, and that the property or rights acquired or the liabilities incurred by the corporation are the property, rights, and liabilities of such legal entity as distinguished from the members who compose it."

In *American Medical Ass'n. v. United States* (1942, C.A. D.C.), 130 F. (2d) 233, aff'd. on other grounds, 317 U.S. 519, the Court of Appeals said (253):

> "When a corporation is guilty of a crime it is because of a corporate act, a corporate intent; in short, corporate commission of crime. The fact that a corporation can act only by human agents is immaterial. How separate is the identity of the corporate person and the individual person, where criminal liability is concerned,

is shown by the fact that a corporation may be found guilty of a crime, the essential element of which is a specific criminal intent."

In *Klein v. Board of Supervisors* (1930), 282 U.S. 19, this Court said (23):

> "There is no doubt that a state may tax a corporation and also tax the holders of its stock. The *owners* are different and . . . the *property* is different."

and (24):

> "The appellant, pursuing *his notion that shares of stock represent an interest in the property of the corporation*, insists that if taxed at all he should be taxed only in the ratio of the property in the state to the entire property of the corporation; that to tax him for the whole value is to tax property outside of the jurisdiction of the state. But it leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with intent that it should be acted on as if true. The *corporation is a person and its ownership is a non-conductor that makes it impossible to attribute an interest in its property to its members.*"

See also *Bird v. Wilmington Society of Fine Arts* (1945 Sup. Ct. of Del.), 43 Atl. (2d) 476 (483).

Infliction of punishment on stockholders for a crime committed by the corporation would "*shock the sense of justice of everyone*" as indicated by this court many years ago (Pet. Br. 19).

III. More about the Equation of an Individual's Death to a Corporation's Dissolution.

The equation or analogy referred to was drawn by this Court and its accuracy, property-wise, is expounded in our main brief (Pet. Br. 13-18). But, says Respondent, this analogy has not been the subject of universal admiration

(Resp. Br. 9). However, this Court has not repudiated it in whole or in part, not even when commenting that it lacked "universal admiration" (*Defense Supplies Corp. v. Lawrence Warehouse Co.* (1949), 336 U.S. 631 (634). Respondent argues that "Criminal actions abate upon the demise of an individual *because* . . . a fine would punish the . . . heirs *and* . . . the defendant is no longer able personally to defend. . . ." (Resp. Br. 10). To this statement we agree, after adding a *third* reason, to wit, "because the issue of guilt or innocence (which is the sole issue in a criminal case) became moot upon defendant's death." But Respondent's argument from there is to the effect that since a corporation is an instrumentality of its stockholders, a fine imposed upon it is in effect imposed upon the stockholders whether before or after corporate dissolution (Resp. Br. 10). But we have hereinabove illustrated the error of this argument by reference to *Klein v. Board of Supervisors, supra.* Because the corporation is in law a separate entity from its stockholders, and owns its own property in which the stockholders have no interest until the corporation is dissolved (just as the heir has no interest in the property of his ancestor until the ancestor dies) it is clear that the reasons advanced by Respondent why a criminal action abates upon the demise of a natural person are equally applicable to abate the criminal action upon dissolution of the corporate person. Respondent goes on to say that the *stockholders* of the dissolved corporation can retain counsel and defend the corporation against criminal charges as well after dissolution as before (Resp. Br. 10). Here again Respondent ignores the separate entity of the corporation from its stockholders. Here again Respondent ignores that the issue of guilt or innocence becomes moot with the death of the defendant in a criminal case — natural or corporate. No reason is advanced why stockholders

should defend a moot issue on behalf of their dissolved corporation any more than the heirs should defend a moot issue on behalf of a deceased ancestor, since it is clear that neither the stockholders in the one case nor the heirs in the other were punishable for the criminal act of the corporation or the ancestor. If, as Respondent concedes (Resp. Br. 10) levying the fine would punish the *heirs* of the *individual* defendant, then by the same token it would punish the stockholders of the dissolved corporation notwithstanding their non-liability for the crime for which the fine was imposed.

IV. Public Policy

Petitioners affirm their argument on this point (Pet. Br. 19-21), especially in the light of *Sec. 24, Title 15, U.S.C.A.* added to the anti-trust laws in 1914 (Pet. Br. 4).

Respondent suggests that Petitioners' corporate parent Schenley Industries, Inc., *could* employ subsidiary corporations to violate the law and then through the device of voluntary dissolutions, elude penalties imposed for their criminal acts (Resp. Br. 12). This hardly rises to the dignity of requiring a reply. Suffice it to say that if such a situation ever became a reality, Schenley would not be shielded, for the use of subsidiary corporations to violate the law is an effective and long established legal reason for looking through the corporate entity. In the case at hand let it be remembered that the dissolutions of Petitioners were for commercial and legal reasons independent of the indictment (Pet. Br. 8; R. 20, 24, 31), a fact established by the record which Respondent does not deny.

Respondent says (Resp. Br. 11) that public policy is seriously offended by the abatement of a criminal prosecution on dissolution of the corporate offender "where th

corporate dissolution has little or no significance and the same stockholders retain control over the corporate assets and continue the business through the medium of a different corporation, or a partnership or other unincorporated entity." Even if the situation, which Respondent assumes, existed by the record in this case, yet Respondent's argument completely ignores the separate corporate entity of the violator and assumes that the stockholders are ipso facto punishable for the crimes of the corporation. There is nothing in the record or within the narrow scope of the question before this Court to remotely support Respondent's implication that any corporate entity should here be ignored. The fact that the assets of the dissolved corporation may be used in the business of the transferee stockholder, or a different corporation — in either case in the hands of another entity — carries no implication of illegality and certainly no reason why the acquirer should be punished for the crime of another, although if any such *successor* violated the law it would be amenable to punishment for its *own* misdeeds. Respondent might as well argue that an heir who inherits assets from, and continues the business of, an ancestor is by that fact punishable for a crime committed by the ancestor.

Before leaving this phase of Respondent's argument which it calls "policy considerations" (Resp. Br. 13) the question arises as to "*whose* policy considerations". We are persuaded by a decision of this Court that they are the state's, notwithstanding Respondent's quotation from *Alamo Fence Co. v. United States*, 240 F. (2d) 179, 183, C.A. 5 (Resp. Br. 10-11) dealing with a Texas statute. In *Chicago Title and Trust Co. v. Wilcox Building Corp.* (1937), 302 U.S. 120, this court said (127-128):

> "*How long and upon what terms* a state-created corporation may continue to exist is a matter *exclusively*

of state power (Cases). The *circumstances* under which the power shall be exercised and the *extent* to which it shall be carried are matters of state policy, to be decided by the state legislature. There is nothing in the Federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized. And it hardly will be claimed that the Federal Government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority.

The power to take the long step of putting an end to the corporate existence of a state-created corporation without limitation, connotes the power to take the shorter one of putting an end to it *with such limitations as the legislature sees fit to annex* (Cases). And since the Federal Government is powerless to resurrect a corporation which the state has put out of existence for all purposes, the conclusion seems inevitable that if the state *attaches qualifications to its sentence of extinction nothing can be added to or taken from* these qualifications by federal authority."

Because it clearly flies in the face of this language, we examine Respondent's argument as to the Delaware Statute (Resp. Br. 13-19).

V. The Delaware Statute

Respondent centers its argument (Resp. Br. 13-18) on *Sec. 278, Title 8, Delaware Code 1953* (Resp. Br. 3; Pet. Br. 5 and 25), and devotes less than a page (Resp. Br. 18-19) to the companion Section 281 (Resp. Br. 28-29; Pet. Br. 25-26). Yet these two sections must be read together dealing as they do with the same subject. Section 281 prescribes the uses to which the assets of the dissolved corporation shall be put. These are qualifications imposed by Delaware with respect to the dissolution of a Delaware corporation.

If the voice of this court in *Chicago Title and Trust Co. v. Wilcox etc., supra,* be heeded, *"nothing can be added to or taken from those qualifications by federal authority"*. Section 281 enumerates these uses and, under familiar rules of statutory construction, such enumeration eliminates all uses not included. The enumerated uses are: (1) payment of all allowances, expenses and costs and the satisfaction of all special and general liens upon the funds of the corporation; (2) payment of the other debts due from the corporation; (3) distribution of any balance among the stockholders. Plainly (1) and (3) are out of the discussion. In (2) the term "debts due from the corporation" can only have reference to some claim for compensation existing against the corporation (whether contractual, tortious or statutory in nature) *at the time of its dissolution* (although perhaps not then adjudicated or liquidated). A criminal fine imposed over two years after the corporate dissolution, being punishment and not remedy, has no existence until imposed (Pet. Br. 10-13) and is certainly not a debt due from the corporation *at the time of its dissolution* in any sense of the word. It seems, therefore, that Section 281 imposes a restriction on Section 278 which would limit the "actions, suits, or proceedings" permitted against a dissolved corporation to those to establish the liability within one or more of the classes described in Section 281. It is submitted that those classes exclude criminal fines levied subsequent to the dissolution.

Respondent relies heavily upon *United States v. P. F. Collier & Son*, 208 F. (2d) 936 C.A. 7, to support its theory that dissolution does not abate the criminal prosecution of a Delaware corporation. Petitioners' reasons for believing the *Collier* decision to be wrong have already been fully expounded (Pet. Br. 27-32) with differentiations of *Bahen & Wright v. Com'r.*, 176 F. (2d) 538 C.A. 4, and *Addy v.*

Short, 47 Del. 157, mentioned in the *Collier* case (Pet. Br. 32). If the *Collier* case is wrong, District Court cases which followed it will little support Respondent's position. Cases speaking of civil and criminal liability in the same breath and assuming them to be equals in nature have overlooked the inherent difference in nature and purpose which necessarily separates them. Such a case is *United States v. Western Pa. Sand & Gravel Ass'n.* (1953 D.C. Pa. W.D.); 114 F. Supp. 158, 160 (cited in Resp. Br. 11). Petitioners have pointed out this distinction with the aid of decisions of this Court (Pet. Br. 28-29) and it is clear that the term "criminal liability" means "punishment" and has no existence prior to imposition of punishment.

Respondent argues (Resp. Br. 15-16) that the word "proceeding" in the Delaware statute governing dissolved corporations (which is strictly a civil, remedial statute) ought to embrace "criminal proceeding" because Delaware *Criminal* Statutes and both the Federal Rules of *Criminal* Procedure and the Rules of *Criminal* Procedure for the Delaware Superior Court refer throughout to "*criminal* proceedings". It occurs to us that references in these criminal statutes and rules to *criminal* proceedings lend force to Petitioners' theory that the bare word "proceeding" in a *civil* statute means only a civil proceeding.

This Court will note that on page 15 of Respondent's Brief, wherever "proceeding" or "procedure" is intended to relate to criminal matters, it is preceded by the word "criminal".

VI. The Maryland Statutes

There is nothing in Respondent's argument with respect to the Maryland statutes (Resp. Br. 19-22) which necessitates any change in or elaboration upon Petitioners' main argument on that subject (Pet. Br. 21-24). Sec. 72(b)

Article 23, Annotated Code of Maryland 1951 (Pet. Br. 4-5 and 21; Resp. Br. 29) prescribes the *sole purpose* for which a Maryland corporation exists after dissolution. If the language of this Court in *Chicago Title & Trust Co. v. Wilcox, supra,* is heeded, that purpose can not be enlarged to embrace a criminal fine imposed after dissolution, since it could not have been an existing debt or obligation of the corporation at the time of its dissolution.

Respondent cites *Diamond Match Co. v. State Tax Comm.* (1938 Md.), 175 Md. 234, 200 Atl. 365 (Resp. Br. 19) but the case did not involve a criminal prosecution and merely held that a statute enacted in April 1936, imposing a *retroactive* tax on corporations as of January 1936 was constitutional as to a corporation dissolved after that date but before the statute was passed. The liability for the tax was *civil* and since the legislature had power to make the tax retroactive — the liability was there at the date of dissolution.

VII. The Post-dissolution Existence of a State-created Corporation Is Limited to Such Purposes as the State May Specify.

The gist of Respondent's argument (Resp. Br. 23-26) is that if the state continues a corporate existence after dissolution for *any* reason at all, no matter how limited or restricted, it is sufficient to enable criminal prosecution under the federal Anti-trust laws, because (Respondent says) that is the meaning of *Sec. 7, Title 15, U.S.C.A.*[1] (This section appears in Pet. Br. 4; Resp. Br. 3).

It is submitted that Respondent's argument is diametrically opposed to the above quoted language of this court in *Chicago Title & Trust Co. v. Wilcox, et al., supra.* Further-

[1] This section is also Section 8 of the Sherman Act.

more, it is submitted that the theory of Respondent's argument on this point is largely, if not wholly, the theory of the *dissenting* opinion in *Chicago Title & Trust Co. v. Wilcox Building Co.*, 302 U.S. 130-134, which, persuasive tho it was, did not become the law. Petitioners' main brief carries further argument on this point (Pet. Br. 34-35).

CONCLUSION

The essential, fundamental difference in nature and purpose between a civil or remedial action and a criminal prosecution, or, to put it another way, between "civil liability" and "criminal liability" is embedded in our system of jurisprudence. It is one of the boundaries in the law. It is familiar to every student of the law. If it is lost or obscured by failure to recognize and enforce it, then uncertainty and confusion seep into the area which it once marked. It may be that in their desire to accomplish the widest possible enforcement of the Anti-trust laws and penalties, the representatives of the Government have not recognized that what they seek means, in this case, the pro tanto obliteration of a legal boundary. In *Gouled v. United States* (1921), 255 U.S. 298, this Court once said that the Fourth and Fifth Amendments to the Constitution should be literally construed (304):

> "... so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."

In a measure, perhaps, some part of that language may be appropos here.

Furthermore, it seems to us that Respondent's contention that public policy will be seriously offended if a criminal anti-trust prosecution of a corporation abates upon its dissolution is lacking in weight in view of *Section 24, Title*

15, *U.S.C.A.* (printed in Pet. Br. 4) added to the Anti-trust laws in 1914. In fact, it was applied in the indictment in this case. An officer of each of Petitioners was indicted along with each Petitioner (R. 3-4-5). Under that section there can be multiple indictments for the corporate offence which remain standing should the corporation dissolve. Congress could have debated long before hitting upon a more effective deterrent to the very thing over which Respondent's counsel profess anxiety — dissolution and reincorporation.

For the reasons set forth above and in their main brief, the decision of the court below should be reversed as to each Petitioner.

Respectfully submitted,

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